SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 33

PAUL E. SULLIVAN, et al., *Petitioners*

v.

LITTLE HUNTING PARK, INC., et al.

T. K. FREEMAN, JR., et al., *Petitioners*

v.

LITTLE HUNTING PARK, INC., et al.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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Petitioners pray that a writ of certiorari issue to review the decision of the Supreme Court of Appeals of Virginia entered October 14, 1968, in these two related cases.[1]

[1] Petitioners in the *Sullivan* case, in addition to Paul E. Sullivan, are Flora L. Sullivan, his wife, and their seven minor children, William F. Sullivan, Graciela P. Sullivan, Ana I. Sullivan, Maire Sullivan, M. Dolores Sullivan, M. Monica Sullivan, and Brigid Sullivan, who sued by and through Paul E. Sullivan, their father and next friend. In the *Freeman* case the petitioners, in addition to T. R. Freeman, Jr., are Laura Freeman, his wife, and their two minor children, Dale C. Freeman and Dwayne L. Freeman, who sued by and through T. R. Freeman, Jr., their father and next friend. Respondents in both cases, in addition to Little Hunting Park, Inc., are Mrs. Virginia Moore, Ronald L. Arnette, S. Leroy Lennon, Raymond R. Riesgo, Mrs. Marjorie Madsen, William J. Donohoe, Oskar W. Egger, and Milton W. Johnson, individuals who were directors of said corporation at times material herein.

PRIOR OPINIONS

This Court's earlier *per curiam* opinion remanding these cases to the Supreme Court of Appeals of Virginia is reported at 392 U.S. 657, and is printed in Appendix B hereto, *infra*, p. 32. The opinion of the Supreme Court of Appeals of Virginia subsequent to the order of remand is reported at 163 S.E.2d 588, and is printed in Appendix B hereto, *infra*, pp. 33-35. The memorandum orders of the Supreme Court of Appeals of Virginia rejecting the appeals from the trial court are not reported and are printed in Appendix B hereto, *infra*, pp. 36-37. The decision of the trial court in the *Sullivan* case was contained in a letter to the parties dated April 7, 1967, which is reported at 12 Race Rel. L. Rep. 1008, and the decree was entered April 12, 1967; they are printed in Appendix B hereto, *infra*, pp. 38-41. The trial court's decision in the *Freeman* case was contained in a letter dated April 21, 1967, which is not reported, and the decree was entered May 8, 1967; they are printed in Appendix B hereto, *infra*, pp. 42-44.

JURISDICTION

The decision of the Supreme Court of Appeals of Virginia was rendered on October 14, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the Supreme Court of Appeals of Virginia properly relied upon a non-federal procedural ground as the sole basis for refusing to accept the remand of this Court after this Court had held that such ground was inadequate to bar consideration of the federal questions presented by this case.

2. Whether the Civil Rights Act of 1866 (42 U.S.C. §§ 1981, 1982) which guarantees Negroes the same rights as are enjoyed by white persons to make and enforce contracts

and to lease and hold property is violated when a Negro, because of his race, is not permitted by the board of directors of a community recreation association to use a membership share which has been assigned to him by his landlord as part of the leasehold estate.

3. Whether a landlord who is expelled from a community recreation association because he voices disagreement with with the directors' racially motivated refusal to approve his assignment of a share in the association to his Negro tenant may obtain relief from the association's retaliatory action under the Civil Rights Act of 1866 (42 U.S.C. §§ 1981, 1982).

4. Whether the Fourteenth Amendment to the Constitution of the United States is violated by a community recreation association when it excludes from its facilities on the basis of his race, a person who is otherwise eligible to use them, and by a state court in sanctioning the exclusion.

5. Whether the free speech protections of the First and Fourteenth Amendments to the Constitution of the United States are violated by a community recreation association when it expels a shareholder for dissenting from its discriminatory racial policy, and by a state court in sanctioning the expulsion.

STATUTORY AND CONSTITUTIONAL PROVISIONS

The statutory provisions involved are 42 U.S.C. §§ 1981 and 1982. The provisions of the Constitution of the United States involved are Article VI, the First Amendment, the Thirteenth Amendment and the Fourteenth Amendment, Section 1. The foregoing provisions are set forth in Appendix A, *infra*, pp. 29-30.

STATEMENT

A. Introduction

Briefly, respondent Little Hunting Park, Inc. is a Virginia non-stock corporation organized for the purpose of operating a community park and swimming pool for the benefit of residents of certain housing subdivisions in Fairfax County, Virginia. A person who owns a membership share entitling him to use the association's facilities is permitted under the corporate by-laws, in the event he rents his house to another, to assign the share to his tenant, subject to approval by the board of directors. In the instant case the directors refused to approve such an assignment from Paul E. Sullivan to Dr. T. R. Freeman, Jr., solely on the ground that Freeman and the members of his family are Negroes. When Sullivan protested the directors' discriminatory racial policy and sought to reverse their refusal to approve the assignment, they expelled him.

Petitioners sued separately in the state court challenging on federal, as well as state, grounds the racial restriction imposed by the directors on the assignment of the share in the association, and asserting the unlawfulness of Sullivan's expulsion; injunctive relief and monetary damages were sought. Following trials, the lower court dismissed the complaints holding that the corporation is a "private social club" with authority to determine the qualifications of those using its facilities, including the right to deny such use on the basis of race. The court also held that the corporation's expulsion of Sullivan was permitted by its by-laws and was justified by the evidence. Petitions for appeal were thereafter submitted to the Supreme Court of Appeals of Virginia, which were rejected by that court for the stated reasons that petitioners had failed to comply with a procedural rule of that court.[2]

[2]The Virginia court, citing its Rule 5:1, Sec. 3(f), (Appendix A, *infra*, pp. 30-31), stated that the appeals were "not perfected in the manner provided by law in that opposing counsel was not given reasonable

In their petition for a writ of certiorari filed in this Court on March 1, 1968, petitioners contended that the Virginia court's application of its procedural rule to bar the appeals was arbitrary and unreasonable—warranted neither by the facts nor the court's prior construction of its procedural rule. Accordingly, petitioners asserted that in view of the claimed violations of their federally protected rights, the procedural ground on which state court based its decision should be examined to determine its adequacy to bar review by this Court.[3]

This Court in a *per curiam* opinion rendered June 17, 1968, stated (392 U.S. 657):

> The petition for a writ of certiorari is granted and the judgment is vacated. The case is remanded to the Supreme Court of Appeals of Virginia for further consideration in light of *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409.

The order of remand was thereafter received by the Supreme Court of Appeals of Virginia, and on October 14,

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written notice of the time and place of tendering the transcript and a reasonable opportunity to examine the original or a true copy of it." The rule referred to provides that as part of the procedure for certifying a record for appeal the reporter's transcript must be tendered to the trial judge within 60 days and signed at the end by him within 70 days after final judgment. The rule also states: "Counsel tendering the transcript . . . shall give opposing counsel reasonable written notice of the time and place of tendering it and a reasonable opportunity to examine the original or a true copy of it." 2 Code of Virginia, 1950 (1957 Replace. Vol.) 602.

[3]Citing *Parrot v. City of Tallahassee*, 381 U.S. 129; *N.A.A.C.P. v. Alabama*, 377 U.S. 288, 297; *Staub v. City of Baxley*, 355 U.S. 313, 318-320; *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 454-458. In their petition for certiorari, petitioners related in detail the steps they had gone through to comply with the state court's procedural rule, and showed how they had in fact complied with it in both substance and form, on the basis of the state court's prior construction of its rule. (For the convenience of the Court, the relevant facts and authorities relied on by petitioners in support of their contention are repeated *infra*, pp. 23-27.) The opposition to the petition for certiorari filed by respondents was based exclusively on the procedural issue.

1968, that court issued an opinion declaring its refusal to accept the remand. The court cited as its reason the same ground originally given for refusing to hear the cases, i.e., petitioners, asserted failure to perfect their appeals from the trial court because of noncompliance with the procedural rule.

In view of the unavailability of the state court as a forum for consideration of the asserted violations to the petitioners' federally protected rights, petitioners now appeal to this Court for a second time, and respectfully urge it to consider the merits of the significant questions presented herein.

B. Little Hunting Park, Inc.—Its purpose and manner of operation

Little Hunting Park, Inc. was incorporated in 1954 under the Virginia Non-Stock Corporation Law[4] for the purpose, as set forth in its certificate of incorporation, of organizing and maintaining "a community park and playground facilities" for "community recreation purposes" (T. 184-185).[5] Pursuant to this object, the corporation owns land on which it has built and operates a swimming pool, tennis courts and other recreation facilities for the benefit of residents of specified subdivisions and certain adjacent neighborhoods in Fairfax County, Virginia (T. 186, 228). The corporation's by-laws provide that shares may be purchased by adult persons who "reside in, or who own, or who have owned housing units" in one of the specified subdivisions (T. 186). A share entitles all persons in the immediate family of the shareholder to use the corporation's recreation facilities (T. 186-187).

The by-laws limit the number of shares in the corporation to 600 (T. 186). There is no limitation, however, on

[4] § 13-220, Code of Virginia, 1950 (1949 ed.).

[5] "T." refers to the transcript in the *Sullivan* case. "F.T." refers to the *Freeman* transcript.

the number of shares that an individual may own, and it is not unusual for a person owning more than one house in the neighborhood served by Little Hunting Park pool to own a separate share for the use of the family occupying each house (T. 9, 189-190). Shares may also be purchased by institutions and corporations owning property in the area where the swimming pool is located. Thus, a share is owned by a church located in the neighborhood, and shares have been owned by two real estate companies that built and marketed the houses in Bucknell Manor and Beacon Manor, subdivisions served by Little Hunting Park. These two corporations have, at various times, owned at least 25 shares which they have retained for periods ranging from 5 to 7 years (F.T. 42-44).

The right to use Little Hunting Park's facilities may be acquired by purchase or by temporary assignment of a corporate share. The share may be purchased directly from the corporation, from any shareholder, or, upon buying a house in the community, from the vendor as part of the consideration for the purchase price of the house (T. 9, 187-189). A person residing within one of the subdivisions served by Little Hunting Park may obtain temporary assignment of a share; however, an assignment may only be made from landlord to tenant. (T. 187, 200).[6]

The corporation's by-laws have always provided that the issuance and assignment of shares are subject to the approval of the board of directors (T. 15, 192, 251-252). There were 1,183 shares issued and 322 shares assigned during the period from 1955 through 1966, the first 12 years of the corporation's existence (T. 192-193, 196-197). However, with the exception of the assignment described below to Dr. T. R. Freeman, Jr., there is no record of any assignment ever being denied approval by the directors (T. 199). One

[6]Regardless of whether the swimming pool and park facilities are used by the shareholder or assignee, the owner of a share is obligated to pay an annual assessment in order to keep his share valid. (T. 9-10, 199-200).

applicant for the purchase of a share was disapproved during that period, but there is no evidence that this was other than because of the individual's failure to satisfy the geographic residence requirement of the by-laws (T. 198-199).

C. The corporation's directors refuse to approve the assignment of Paul E. Sullivan's share because the assignee, Dr. T. R. Freeman, Jr., and his family, are Negroes.

From December 1950 to March 1962, Paul E. Sullivan and his family lived in a house which Sullivan owned and continues to own on Quander Road in the Bucknell Manor subdivision (T. 7). In May 1955, shortly after Little Hunting Park, Inc. was organized, Sullivan purchased a share, No. 290, for $150 (T. 7-8). In March 1962, Sullivan and his family moved a short distance to another house that Sullivan purchased located on Coventry Road in the White Oaks subdivision where, as part of the purchase price for the property, Sullivan acquired a second share from the seller of the house. Share No. 925 was thereafter issued to Sullivan by the corporation (T. 8-9, 66-67). After moving to Coventry Road, Sullivan continued paying the annual assessments on shares Nos. 290 and 925, and leased his house on Quander Road to various tenants. In consideration of the rent, he assigned share No. 290 as part of the leasehold interest (T. 9-10, 12, 14-16). Sullivan testified that the lease arrangement was a "package deal . . . the house, the yard, and the pool share" (T. 10).

On February 1, 1965, Sullivan leased the Quander Road premises for a term of one year to Dr. T. R. Freeman, Jr. at a rent of $1,548, payable in monthly installments of $129 (T. 10-11). The deed of lease described the property demised as "the dwelling located at 6810 Quander Road, Bucknell Manor, Alexandria, Virginia 22306, and Little Hunting Park, Inc. pool share No. 290" (T. 11). The lease was extended in identical terms as of February 1, 1966, and February 1, 1967 (T. 10-11). Dr. Freeman met all of the

eligibility requirements for an assignee of a share in the corporation, since he is an adult, and the house that he leased from Sullivan is in Bucknell Manor subdivision (T. 204-205). Freeman has no disqualifications; he is an agricultural economist with a Ph.D. degree from the University of Wisconsin, and at the time of the events herein was employed by the Foreign Agriculture Division of the United States Department of Agriculture (T. 176-177). He also holds the rank of Captain in the District of Columbia National Guard (T. 177). Dr. Freeman and his wife and children are Negroes (T. 178).

In April 1965, Paul E. Sullivan paid the annual assessment of $37 on share No. 290 and, pursuant to his obligation contained in the lease on the Quander Road property, completed the form prescribed by the corporation affirming that Dr. Freeman was his tenant and therefore eligible to receive the assignment of that share (T. 11-12). Additionally, Dr. Freeman supplied certain information and signed the form, thereby doing everything required by the corporation to qualify as an assignee of the share (T. 12). However, the board of directors of the corporation, meeting on May 18, 1965, refused to approve the assignment of share No. 290 to Dr. Freeman, because he and the members of his family are Negroes (T. 13, 17-18, 164, 204-205, 239-240, 281). On May 25, 1965, Sullivan received a letter from S. L. Lennon, the corporation's membership chairman, notifying him that his assignment of share No. 290 to Dr. Freeman had been denied approval by the board of directors; no reason was given (T. 13).

D. The corporation's directors expel Paul E. Sullivan because of his criticism of their refusal to approve the assignment of his share to Dr. T. R. Freeman, Jr. on the basis of race.

Sullivan, upon learning of the directors' disapproval of his assignment to Dr. Freeman, sought further information concerning their action (T. 13-14, 16). In response to his

inquiry, a delegation from the board membership chairman S. L. Lennon, John R. Hanley, a former president and director of the corporation, and Oskar W. Egger, a director visited Mr. and Mrs. Sullivan at their home on May 28, 1965, and admitted that Dr. Freeman had been rejected solely because of his race (T. 16-18, 163-164, 250, 259, 278, 281). To Sullivan, this action was shocking, and as a matter of his religious teaching and conviction, immoral; he so informed the delegation. Furthermore, as a resident of the neighborhood for many years and as a member of Little Hunting Park, Inc. since its inception, he could not believe their assertion that the board's action reflected the unanimous view of the members of the corporation (T. 19, 22, 164). Nor could Sullivan in good conscience accept the board's offer to purchase share No. 290 which he had contracted to assign to Dr. Freeman (T. 18-19).

Following this meeting, Sullivan and Dr. Freeman, who was also his fellow parishioner, sought the advice of their priest, Father Walsh, who suggested that the board might reconsider its action if the directors had an opportunity to meet with Dr. Freeman and consider his case on its merits (T. 26). The suggestion that such a meeting be held was rebuffed, however, by Mrs. Moore, the corporation's president, when Sullivan spoke to her on June 9 (T. 28-29, 165). At about the same time, Sullivan spoke with several other shareholders, who, upon learning of the board's action, wrote letters to President Moore in which they expressed their strong disagreement with the board's action in disapproving Dr. Freeman (T. 217-223). After receipt of these letters, the board met on June 11, and decided that there appeared to be "due cause" for Sullivan's expulsion from the corporation because of his "non-acceptance of the Board's decision" on the assignment of his share "along with the continued harassment of the board members, etc." (T. 29-31, 204, 220).[7]

[7]The sole ground for expulsion provided under the corporate by-laws is for conduct "inimicable [sic] to the corporation's members." Article III, Section 6(b). The board purported to act under this section in expelling Sullivan (T. 29-31, 206-207).

Sullivan was told of the board's action in a letter from President Moore dated July 7, 1965, which also informed him that he would be given a "hearing" by the directors on July 20, 1965 (T. 29-31, 206). Because the directors refused to postpone the hearing in order that Sullivan's attorney could appear with him, and because they refused to provide Sullivan with a statement of the conduct alleged to constitute the basis for his expulsion, Sullivan was compelled to commence a civil action in the Circuit Court of Fairfax County (T. 52-53). Settlement of the action was reached upon the corporation's agreeing to postpone the hearing to August 17, 1965, and to furnish a detailed statement of the charges against him (T. 53). A statement specifying the alleged grounds for Sullivan's expulsion was thereafter furnished to him (T. 20-21).

At the "hearing" held by the directors on August 17, no evidence was introduced in support of any of the allegations against Sullivan, and he was not permitted to learn the identity of the persons making charges against him, nor to question them. He was also denied permission to have a reporter present to transcribe the proceeding. He had only the opportunity to present evidence concerning the charges as he understood them, and to state his views (T. 45-46, 53-55, 62-63, 129-130, 131, 286-287, 289). On August 24, 1965, the board met, and unanimously voted to expel Sullivan (T. 228). By letter of August 27, 1965, Sullivan was notified by President Moore of his expulsion, and he was tendered the then current "sale price" of his two shares, plus prorated annual assessments on the two shares, the total amounting to $399.34 (T. 55, 173-174).

E. Relief sought

Petitioners seek injunctive relief and monetary damages under the Civil Rights Act of 1866 (14 Stat. 27, 42 U.S.C. §§ 1981 and 1982), as well as under the First, Thirteenth and Fourteenth Amendments. However, since the petitioners in the *Freeman* case no longer reside in the area served

by Little Hunting Park, Inc., their claim is now limited solely to compensatory and punitive damages, pursuant to the allegations of their complaint, as the result of having been denied access for 2 years to the community recreation facilities operated by the association.[8] Petitioners in the *Sullivan* case seek an order compelling full reinstatement of Paul E. Sullivan in Little Hunting Park, Inc. and reinstatement of shares Nos. 290 and 925. They also seek compensatory and punitive damages from respondents for Paul E. Sullivan's wrongful expulsion from the association and the denial to them of the use of its facilities.

The federal statutory questions involved here were the basis for the Court's remand of this case to the Supreme Court of Appeals of Virginia for further consideration in light of *Jones v. Alfred H. Mayer Co.* Petitioners have also relied throughout the proceeding on the Fourteenth Amendment, asserting that Little Hunting Park, Inc., by its operation of a community park and recreation facility, exercises a public function and hence is prohibited by the Equal Protection clause from denying persons the use of its facilities on the basis of race (*Freeman* memorandum to trial court in opposition to demurrer, pp. 22-23). Petitioners have further contended that their rights under the Fourteenth Amendment are violated by the state court's giving validity to the racial restriction imposed by respondents on the Little Hunting Park facilities (*Sullivan* and *Freeman* complaints). Finally, petitioner Paul E. Sullivan contended at the trial that his expulsion from the association because of his dissent from its racial policy violated his constitutional right of free speech (T. 224-245). In his petition for appeal, Sullivan further contended on the basis of *Curtis Publishing Co. v. Butts*, 388 U.S. 130, which had been decided in the interim between the trial and the filing of the appeal, that

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[8] In June 1967, Dr. Freeman and the members of his family left the United States, and they currently reside in Pakistan where Dr. Freeman is Assistant Agricultural Attache in the United States Embassy.

the directors of Little Hunting Park, Inc. were "public figures" in the community within the meaning of that case. Hence, it was asserted that the court could not under the First and Fourteenth Amendments apply state law to "sanction or recognize as valid the directors' action in expelling Sullivan from the association merely because he exercised his right to speak out critically concerning their discriminatory racial policy" (*Sullivan* petition for appeal, p. 34).

REASONS FOR GRANTING THE WRIT

1. The Court, by granting certiorari in this proceeding in the first instance, impliedly held that the non-federal ground on which the Supreme Court of Appeals of Virginia rejected the appeals in these cases was inadequate to bar consideration of the federal questions involved. Upon remand, however, the Virginia court adhered to its prior holding, again asserting that because the procedural rule had not been complied with, the cases were not properly before it. The court, therefore, refused to consider the issues on the merits in light of *Jones v. Alfred H. Mayer Co.*, as required by this Court's mandate.

The refusal by the Supreme Court of Appeals of Virginia to comply with this Court's order of remand is itself compelling reason for the Court to grant certiorari in this case. By its action, the state court has disregarded its duty under the Supremacy Clause, and for this Court to allow this extraordinary conduct to pass without notice can only be detrimental to our system of government. *Martin v. Hunter's Lessee*, 1 Wheat. 304.[9]

2. Certiorari should be granted to determine whether petitioners have been denied rights guaranteed to them by

[9]Petitioners assume that this Court's holding that the state ground of decision is inadequate to bar review of the federal questions is not now subject to reexamination by the Court. *Tyler v. Magwire*, 17 Wall. 253, 283-284; *N.A.A.C.P. v. Alabama*, 360 U.S. 240, 245, and cases cited.

the Thirteenth Amendment and 42 U.S.C. §§ 1981, 1982 (Civil Rights Act of 1866, 14 Stat. 27).[10]

Last Term, in *Jones v. Alfred H. Mayer Co., supra*, the Court held that 42 U.S.C. § 1982, which was part of § 1 of the Civil Rights Act of 1866 "bars *all* racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment." 392 U.S. at 413 (emphasis in original). The Court in the *Jones* case did not specifically consider 42 U.S.C. § 1981. However, since that section also originated in § 1 of the Act of 1866, the Court by implication held that § 1981 similarly "bars *all* racial discrimination, private as well as public," insofar as it affects the right of Negroes, *inter alia*, "to make and enforce contracts." 392 U.S. at 413, 441-442 n. 78.

The complaint in the *Freeman* case embodied two causes of action: one alleging wrongful interference by respondents with performance of the deed of lease between Sullivan and Freeman, and the other asserting wrongful deprivation by respondents of Freeman's full use and enjoyment of the leasehold estate demised to Freeman under the deed of lease. By disapproving the assignment of share No. 290 to Freeman and thus preventing performance of the contract between Sullivan and Freeman solely because of the latter's race, respondents violated Freeman's right guaranteed by § 1981 to make and enforce contracts under the same conditions as white persons. Freeman's rights guaranteed him by § 1982 were also violated by respondents. Thus, since share No. 290 was an integral part of the leasehold estate conveyed from Sullivan to Freeman and represented part of the value for which Freeman paid the rent specified in the

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[10]The provisions of 42 U.S.C. §§ 1981, 1982 are also at issue in *Daniel v. Paul*, No. 488, October Term 1968, certiorari granted December 9, 1968. The Court's concurrent consideration of the *Daniel* case and the one at bar would be beneficial from the standpoint of clarifying the scope and effect of these statutory provisions.

lease, respondents' refusal to approve the assignment violated Freeman's right under that section to lease and hold real property without restriction on account of his race. Further, the membership share in Little Hunting Park, Inc., a non-stock corporation, in itself constitutes personal property and hence comes within the terms of § 1982. *Hyde v. Woods*, 94 U.S. 523; *Page v. Edmunds*, 187 U.S. 596; *Baird v. Tyler*, 185 Va. 601, 39 S.E.2d 642, 645-646. It is clear, therefore, that the Freemans have been deprived of rights falling squarely within the ambit of §§ 1981 and 1982 if the statute "means what it says." *Jones, supra*, 392 U.S. at 421.

In dismissing Freeman's complaint, the trial court relied on the provision of the corporation's by-laws which conditioned Sullivan's assignment of share No. 290 on the approval of the board of directors. In this respect, the situation here is no different than in *Shelley v. Kraemer*, 334 U.S. 1, where the property owner similarly did not have an unlimited right to transfer his property. It too was subject to a racially restrictive covenant which was a "condition precedent" to the right of sale. 334 U.S. at 4. The exercise, therefore, by the board of directors of its "right" to approve assignments and determine membership eligibility on the basis of race amounts to nothing less than the explicit racial covenant in *Shelley*. Thus, whether expressly denominated a racial covenant or a right of approval is of no moment;[11] it remains a racial restriction on the use or transfer of property and hence is invalid under the 1866 statute.

3. As well as creating rights for Negroes to be free from discriminatory treatment, 42 U.S.C. §§ 1981 and 1982 impose correlative obligations on persons not to deal discriminatorily

[11] *Lauderbaugh v. Williams*, 409 Pa. 351, 186 A.2d 39; *Mountain Springs Ass'n v. Wilson*, 81 N.J. Super. 564, 196 A.2d 270, 275-277; *Tuckerton Beach Club v. Bender*, 91 N.J. Super. 167, 219 A.2d 529; and see *Harris v. Sunset Islands Property Owners, Inc.*, 116 So. 2d 622 (Fla.).

with Negroes. Thus, if Sullivan had refused to assign share No. 290 to Freeman because of the latter's race he would have violated the statute.

Sullivan was expelled from the corporation, and his two shares were revoked, however, as a direct result of his having dealt with Freeman, as the statute requires, on a non-discriminatory basis, and because he sought to reverse the directors' discriminatory refusal to approve the assignment in order that he could perform his obligation to Freeman under their contract.[12] The expulsion was unquestionably retaliatory, and as "a matter of statutory construction and for reasons of public policy . . . cannot be permitted." *Edwards v. Habib*, 397 F. 2d 687, 699 (C.A.D.C.), and cases cited at n. 48. Sullivan "was expelled from the association for doing that which the law . . . not only authorizes but encourages." *State ex rel. Waring v. Georgia Medical Society*, 30 Ga. 608, 629. The action was therefore contrary to public policy and he is entitled to reinstatement. *Ibid.* Accord: *Malibou Lake Mountain Club v. Robertson*, 219 Cal. App. 2d 181, 33 Cal. Rptr. 74, 77; *Spayd v. Ringing Rock Lodge No. 665*, 270 Pa. 67, 113 Atl. 70; *Bernstein v. Alameda-Contra Costa Medical Ass'n*, 139 Cal. App. 2d 241, 293 P. 2d 862, 865; *Thompson v. Grand International Brotherhood of Locomotive Engineers*, 41 Tex. Civ. App. 176, 91 S.W. 834, 838. Cf. *National Labor Relations Board v. Industrial Union of Marine and Shipbuilding Workers*, 391 U.S. 418, 424-425.

Furthermore, the Court recognized in *Barrows v. Jackson*, 346 U.S. 249, that to sanction "punishment" of a person because he has refused to discriminate would be to render nugatory the rights of Negroes to be free from discrimination. As the Court stated there, "The law will permit respondent to resist any effort to compel her to observe

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[12] Sullivan's membership in the association, including his right to assign his share, was also based on a contract in the form of the corporate by-laws. The directors' invocation of this contract to disapprove the assignment of Sullivan's share to Freeman on racial grounds thus independently violated 42 U.S.C. § 1981, a matter which only Sullivan, who was bound by the by-laws, was in a position to protest.

such a covenant . . . since she is the only one in whose charge and keeping reposes the power to continue to use her property to discriminate or to discontinue such use." 346 U.S. at 259. Similarly here, for the law to sanction Sullivan's punishment by expulsion because of his refusal to discriminate would render Freeman's rights under §§ 1981 and 1982 illusory, indeed.[13]

4. In addition to the statutory grounds for reversal of the court below, there are compelling constitutional reasons why its decision should not stand. It is well recognized that where facilities are built and operated primarily for public benefit and their operation is essentially a public function, they are subject to the limitations to which the State is subject and cannot be operated in disregard of the Constitution. *Evans v. Newton*, 382 U.S. 296; *Marsh v. Alabama*, 326 U.S. 501; *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308.[14] The record here shows that Little Hunting Park, like Baconsfield Park which was the subject of *Evans v. Newton*, performs the public function of providing recreation for members of the community and, accordingly may not be operated on a racially discriminatory basis. Respondent association was organized and incorporated for the express purpose, as stated in its certificate of incorporation, of operating "a community park and playground facilities" for "community recreation purposes" (I. 184-185). Pursuant to this object, it operated its park and swimming pool for 11 years, making its facilities open to everyone who lived in the geographic area defined in the by-laws. Consistent with

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[13]Although the statute declares the rights of Negroes not to be discriminated against, Sullivan, a Caucasian, has standing to rely on the invasion of the rights of others, since he is "the only effective adversary" capable of vindicating them in litigation arising from his expulsion. *Barrows, supra*, 346 U.S. at 259.

[14]Accord: *Terry v. Adams*, 345 U.S. 461; *Public Utilities Comm'n v. Pollack*, 343 U.S. 451; *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959, 968 (C.A. 4), certiorari denied, 376 U.S. 938.

its stated purpose, the corporation never pursued a policy of exclusiveness. It was not until 1965, when Freeman was disapproved, that there was a departure from the corporate purpose, making the park available to everyone in the community, except Negroes.[15]

The impact on the community of the racial policy here is even greater than it was in *Evans v. Newton*. For, rather than being a mere prohibition against the use of a public recreation facility by Negroes, Little Hunting Park possesses the power to significantly affect the racial composition of the community which it serves.

There can be little doubt that the availability of a community swimming pool and recreation facility is a major factor enhancing the desirability and value of residential property.[16] The real estate advertisements in any metropol-

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[15]The trial court's finding that Little Hunting Park is a "private social club" is neither supported by the record nor dispositive of the issues in this case. As in the cases just cited, "private" ownership is not determinative if the entity performs a public function. Unlike a conventional private club, membership in Little Hunting Park, Inc. is not personal to the individual; rather, multiple memberships for investment purposes are permitted and may be held by corporate bodies as well as individuals. Further, the corporation has never exercised any policy of genuine selectivity in passing on applicants for membership and assignment. The sole requirement for membership specified by its charter and by-laws is residence within a specified geographical area; within that area, it "is open to every white person, there being no selective element other than race." *Evans v. Newton, supra*, 382 U.S. at 301. As the Fourth Circuit recently declared, "[S]erving or offering to serve all members of the white population within a specified geographic area is certainly inconsistent with the nature of a truly private club." *Nesmith v. Young Men's Christian Ass'n of Raleigh, N.C.*, 397 F.2d 96, 102. See also, *Rockefeller Center Luncheon Club, Inc. v. Johnson*, 131 F. Supp. 703, 705 (S.D. N.Y.); *United States v. Richberg*, 398 F.2d 523 (C.A. 5).

[16]Expert testimony to this effect was offered by petitioners in the court below (T. 133-136, 138, 146-147). Also see, Urban Land Institute, *Open Space Communities in the Market Place* (Tech. Bulletin 57, 1966), 7, 21, 41, 47-48 (Plaintiffs' Exh. 28).

itan newspaper reveal the emphasis that is placed on the accessibility of a swimming pool in a neighborhood, and attest to the great importance that is attached to this feature in marketing homes.[17]

However, the evidence in this case shows that municipally-owned public swimming pools are virtually non-existent in the Washington metropolitan area of Northern Virginia; the "public function" of providing "mass recreation" (*Evans v. Newton, supra*, 382 U.S. at 302) through community swimming pools has been assumed by privately organized recreation associations.[18] Because of the "abdication" by local municipalities of this "traditional governmental function" (*Mulkey v. Reitman*, 64 Cal. 2d 529, 413 P.2d 825, 832, aff'd, 387 U.S. 369), a significant role is played by "private" associations such as Little Hunting Park in fulfilling this community need. Accordingly, Negroes will be discouraged from moving into a neighborhood where such an association denies them access to the only convenient recreation facilities because of their race. Conversely, a property owner owning a share in such an association will be deterred from selling or renting his house to a Negro, since the Negro will be ineligible for purchase or assignment of the share. Accordingly, since as shown, a house has greater market value if the purchaser or tenant is eligible to use such a facility, if a Negro is able to obtain housing in a community where he is barred from the swimming pool association in which the seller or landlord is a shareholder,

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[17] "[T]he community swimming pool is considered by most builders as one of their most popular sales appeals to people of all ages and incomes." 29 *Practical Builder* No. 2, p. 94 (Feb. 1964) (T. 148, Plaintiffs' Exh. 29). See also T. 148-151, Plaintiffs' Exh. 30.

[18] In the Northern Virginia metropolitan suburbs with a population of nearly 700,000 persons, there are only two municipally owned swimming pools and one lake for swimming (T. 138-139). By contrast, in this same area there are nearly 50 community swimming pools of the same type as Little Hunting Park. In the suburbs of Maryland and Virginia there are over 105 pools of this type. *The Washington Post*, p. A20, June 12, 1967.

there is an immediate loss in the value of the residence which must be borne by one of the parties to the transaction. Thus, an owner in these circumstances will either refuse to sell or rent to a non-Caucasian or else will require him to pay a higher price than the property is worth absent access to the recreation facility. "Solely because of their race, non-Caucasians will be unable to purchase, own, and enjoy property on the same terms as Caucasians." *Barrows v. Jackson, supra,* 346 U.S. at 254. And if this pattern is widespread, and as the record shows to be true for Northern Virginia, governments are unwilling to duplicate privately owned community recreation facilities with municipally operated facilities, non-Caucasians will be discouraged from purchasing or renting housing in whole sections of the State.

Undoubtedly, a significant factor underlying this Court's decision in *Barrows v. Jackson, supra,* and the closely related *Shelley v. Kraemer,* 334 U.S. 1, was recognition of the fact that a racially restrictive covenant is usually part of a system, the effect of which can be to blanket an entire community with racial restrictions, which create Negro and white ghettos. The racially discriminatory policy of Little Hunting Park, no less than the discriminatory policies of those who enter into racial covenants, creates a system which is the equivalent of, and has the effect of a racial zoning ordinance. It is "as if the State had passed a statute instead of leaving this objective to be accomplished by a system of private contracts, enforced by the State." *Bell v. Maryland,* 378 U.S. 226, 329 (dissenting opinion of Justice Black), quoted in *Reitman v. Mulkey,* 387 U.S. 369, 385 (concurring opinion of Justice Douglas). Cf. *Buchanan v. Warley,* 245 U.S. 60.[19]

[19]It should be further noted that the instant case, like *Shelley v. Kraemer,* involves an agreement voluntarily entered into by a white property owner and a Negro attempting to acquire property, with attempted intervention by a third party seeking to prevent performance. *Shelley* and *Barrows* make clear that where, as here, "*both* parties are willing parties" to such a contract a state court may not

5. Constitutional considerations provide further warrant for reversal of the state court's affirmance of Sullivan's expulsion from the corporation. If the directors' summary expulsion of Sullivan because of his dissent from their racial policy is allowed to stand, it will have the effect of granting them an immunity from criticism to which they are not constitutionally entitled. By assuming roles of leadership in Little Hunting Park, Inc.—an organization devoted to developing and operating a community recreation facility—the directors necessarily became parties to any matters of public interest or public controversy in which the association might become involved. It is apparent that whatever way the directors had acted with respect to the Freeman assignment, their decision was likely to be a subject for comment and criticism by members of the association, as well as other persons with an interest in the affairs of the community. The directors were not entitled, however, to expel Sullivan because he voiced opposition to their discriminatory racial policy. Since, as we have shown above, the *public function* performed by Little Hunting Park, Inc. makes it subject to constitutional limitations, forfeiture of an individual's rights under the First Amendment may not be made a condition of use of its facilities. *Marsh v. Alabama, supra,* 326 U.S. 501; *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., supra,* 391 U.S. at 308; and see *Pickering v. Board of Education,* 391 U.S. 563.[20]

give legitimacy to the effort to defeat the contract "on the grounds of the race or color of one of the parties." *Bell v. Maryland, supra,* 378 U.S. at 331 (dissenting opinion of Justice Black) (emphasis in original). It is, of course, immaterial whether the racial restriction is relied on as a basis for seeking affirmative relief, or, as here, is raised as a defense. *Spencer v. Flint Memorial Park Ass'n,* 4 Mich. App. 157, 144 N.W.2d 622, 626; *Clifton v. Puente,* 218 S.W.2d 272, 274 (Tex. Civ. App.). And see, *Rice v. Sioux City Memorial Cemetery,* 349 U.S. 70, 80 (dissenting opinion).

[20]Courts have frequently been guided by the First Amendment in protecting the right of dissent within voluntary associations. See, e.g., *Crossen v. Duffy,* 90 Ohio App. 252, 103 N.E.2d 769, 778; *Mitchell v. International Ass'n of Machinists,* 196 Cal. App. 2d 796, 16 Cal.

The state court's sanctioning of Sullivan's expulsion from the recreation association because of his criticism of the directors' erection of a racial barrier to the use of its facilities is contrary to this Court's decision in *Curtis Publishing Co. v. Butts, supra,* 388 U.S. 130, holding that the First Amendment protects criticism of "public figures" who participate in events of public concern to the community. As was stated there (in the concurring opinion of Chief Justice Warren writing for a majority of the Court) with respect to the urbanized society that we know today:

> In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations and associations, some only loosely connected with the Government. This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or by reason of their fame, shape events in areas of concern to society at large.
>
> Viewed in this context then, it is plain that although they are not subject to the restraints of the political process, "public figures," like "public officials," often play an influential role in ordering society. 388 U.S. at 163-164.

There can be little doubt that Little Hunting Park, Inc. plays the type of public role in the community that is referred to by the Chief Justice, and that the directors of the corporation are "public figures," as he used the term in the *Curtis Publishing* case. Further, as that case holds, it is violative of the First Amendment for the State to lend its

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Rptr. 813, 816-820; *Madden v. Atkins,* 4 N.Y.2d 283, 151 N.E.2d 73, 78; *Gallagher v. American Legion,* 154 Misc. 281, 277 N.Y.S. 81, 85, aff'd 242 App. Div. 604, 271 N.Y.S. 1012; *Hurwitz v. Directors Guild of America,* 364 F.2d 67, 75-76 (C.A. 2), certiorari denied, 385 U.S. 971.

judicial processes to vindicate the aggrievement asserted by a public figure against critics of his manner of participating in events of public interest. Applied to the instant case, this means that the Virginia court could not sanction the directors' action in expelling Sullivan from the association merely because he refused to acquiesce in their discriminatory racial policy, but instead exercised his right to speak out critically concerning the matter. By holding that Sullivan's dissent from the association's policy constituted justification for his expulsion, the trial court invoked a standard of state law which had the effect of depriving Sullivan of rights protected by the First Amendment. *Pickering v. Board of Education*, 391 U.S. 563.[21] This clearly is state action falling within the ambit of the Fourteenth Amendment. "The test is not the form in which state power has been applied, but whatever the form, whether such power has in fact been exercised." *New York Times Co. v. Sullivan*, 376 U.S. 254, 265. Accord: *Curtis Publishing Co. v. Butts, supra*, 388 U.S. at 146-155.

In addition, to permit the state court to sanction Sullivan's expulsion from Little Hunting Park, Inc. for protesting Freeman's exclusion from the community park would be to allow the State to "punish" him for his failure to abide by the directors' determination that he must "discriminate against non-Caucasians in the use of [his] property. The result of that sanction by the State would be to encourage" the use and observance of such racial restrictions on property. *Barrows v. Jackson, supra*, 346 U.S. at 254. See also *Reitman v. Mulkey, supra*, 387 U.S. at 380-381.

6. The state court's rejection of the appeals was arbitrary and unreasonable, and is not a bar to this Court's review of the important federal questions presented in this case. The

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[21] Little weight should be given to the board of directors' determination that Sullivan's conduct was "inimicable" [sic] to the corporation's members in view of the patent procedural deficiencies in the "hearing" granted him prior to his expulsion (*supra*, p. 11). See *Pickering v. Board of Education, supra*, 391 U.S. at 578-579 n. 2.

decree was entered in the *Sullivan* case by the trial court on April 12, 1967, and in the *Freeman* case on May 8, 1967. It is undisputed, as shown by the affidavits of counsel filed in the trial court, and incorporated in the record, that on the morning of June 9, 1967, counsel for the petitioners, Mr. Brown, notified Mr. Harris, counsel for the respondents, by telephone that he would submit the reporter's transcripts in the two cases to the trial judge that afternoon. Mr. Brown further informed Mr. Harris that because of errors in the transcripts, he was filing motions for correction of the record, noticing them for hearing one week hence, Friday, June 16, 1967, which was the court's next Motion Day. Finally, Mr. Brown told counsel that he would request the trial judge to defer signing both transcripts for a 10-day period to allow time for Mr. Harris to consent to the motions or to have them otherwise acted on by the court. That same day, June 9, Mr. Brown wrote Mr. Harris to confirm their telephone conversation, and in his letter Mr. Brown reiterated that he would request the judge not to sign the transcripts until they had been corrected. The afternoon of June 9, when Mr. Brown sought to tender the transcripts to the judge, the latter was away from his office and not expected to return that day, so Mr. Brown left the transcripts as well as a copy of his letter to Mr. Harris with the judge's secretary; the judge later ruled that the tender of the transcripts was made on Monday, June 12, the day that he received them. Meanwhile, motions to correct the two transcripts were served on Mr. Harris, along with the notice that they would be brought to hearing before the court on Friday, June 16.

On Monday morning, June 12, the trial judge acknowledged to Mr. Brown over the telephone that he had received the transcripts and the motions to correct the record. Pursuant to Mr. Brown's request, he agreed to defer signing the transcripts until the motions had been acted on. That same day, Mr. Harris wrote to Mr. Brown in reference to their telephone conversation of the preceding Friday, noting that because he did not have copies of the transcripts he could

not consent to the requested corrections without reviewing the testimony.

On Friday, June 16, the judge stated in court that the transcripts had been available in his office for one week since the preceding Friday, for examination, but since it appeared that Mr. Harris had not examined them, the motions to correct the record would not be acted on until Mr. Harris indicated his agreement or disagreement with the changes requested. In order to facilitate Mr. Harris' examination of the transcripts, Mr. Brown lent him the petitioners' duplicate copies, which Mr. Harris had in his possession from 1:20 p.m., June 16, until 6:30 p.m., June 19, at which time they were returned to Mr. Brown. Upon returning the transcripts, Mr. Harris stated that he had no objections to any of the corrections requested by the petitioners or to the entry of orders granting the motions to correct the transcripts. Mr. Harris then signed the proposed orders granting the motions which Mr. Brown had prepared. The proposed orders were submitted to the trial judge on June 20, who thereupon entered them, and after the necessary corrections were made, signed the transcripts on that date.

On the basis of the foregoing facts and relevant decisions of the Supreme Court of Appeals of Virginia, it is clear that petitioners fully complied with Rule 5:1, Sec. 3(f). That court has repeatedly held that the rule is complied with when, as here, opposing counsel has actual notice of the tender of the transcript to the trial judge and has a reasonable opportunity to examine the transcript for accuracy before it is authenticated by the judge. See, *Bacigalupo v. Fleming*, 199 Va. 827, 102 S.E.2d 321, 326; *Hyson v. Dodge*, 198 Va. 792, 96 S.E.2d 792, 798-799; *Kornegay v. City of Richmond*, 185 Va. 1013, 41 S.E.2d 45, 48-49. In construing the rule, the Virginia court follows the practice of considering the facts and circumstances of each case, and on numerous occasions has overruled objections to appeals where, as here, it appears that the purpose of the rule has

been satisfied and the appellee has not shown that he was "in any way prejudiced" by the procedure followed. *Stokely v. Owens*, 189 Va. 248, 52 S.E.2d 164, 167.[22] The *Barigo-lupo* case, *supra*, involved circumstances almost identical to those presented here, and illustrates the liberal construction customarily placed by the Virginia court on the rule in question. There the trial judge, after ruling that the prior notice to opposing counsel of tender had not met the requirement of reasonableness, advised the parties that he would defer signing the transcript for seven days to afford counsel opportunity to examine the transcript and indicate his objections, if any. In holding that this procedure complied with Rule 3:1, Sec. 3(1), the Supreme Court of Appeals stated (192 S.E.2d at 326):

> The requirement that opposing counsel have a reasonable opportunity to examine the transcript sets out the purpose of reasonable notice. If, after receipt of notice, opposing counsel be afforded reasonable opportunity to examine the transcript, and to make objections thereto, if any he has, before it is signed by the trial judge, the object of reasonable notice will have been attained.

It is thus clear that even if insufficient advance notice was given to respondents' counsel, Mr. Harris, of the tender of the transcripts to the judge, this deficiency was cured by the ample opportunity that Mr. Harris had after the tender to examine the transcripts and the motions to correct the transcripts, and to make any objections thereto. Further, Mr. Harris' signing of the proposed orders granting the motions to correct the transcripts reflect the fact that he had examined the transcripts and the proposed corrections, and "waived" any further objections that he had to the procedure being followed. *Kornegay v. City of Richmond*,

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[22] See also, *Cook v. Virginia Holsom Bakeries, Inc.*, 207 Va. 815, 153 S.E.2d 209, 210; *Grimes v. Crouch*, 175 Va. 126, 7 S.E.2d 115, 116-117; *Town of Falls Church v. Myers*, 187 Va. 110, 46 S.E.2d 31, 34-35; *Taylor v. Wood*, 201 Va. 615, 112 S.E.2d 907, 910.

supra, *Grimes v. Crouch*, *supra*, *Taylor v. Wood*, *supra*. Although the state court, in the opinion it cites as the basis for rejecting the appeals, characterized the rule in question as "jurisdictional" (*Snead v. Commonwealth*, 200 Va. 850, 108 S.E.2d 399, 402), it is clear from the *Bacigalupo* decision and other cases cited above, that the court exercises considerable discretion in determining whether it has been complied with. The state court thus not only ignored its own precedents in reaching the result it did here, but under the mode of practice that it allows, could have exercised its discretion to hear the appeals. That court's "discretionary decision" to deny the appeals did "not deprive this Court of jurisdiction to find that the substantive issue[s]" were properly before it. *Williams v. Georgia*, 349 U.S. 375, 389. *Shuttlesworth v. City of Birmingham*, 376 U.S. 339. See also, *Ward v. Board of County Commissioners*, 253 U.S. 17, 22, and cases cited *supra*, p. 5, n. 3.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari and decide the case on the merits. In the event that the Court holds for the petitioners, it would appear that another remand to the Supreme Court of Appeals of Virginia would be futile, in view of that court's insistence that it does not have jurisdiction over the proceeding. Therefore, petitioners respectfully suggest that the Court may wish to treat this petition as a petition for a writ of certiorari to the Circuit Court of Fairfax County, Virginia, where the cases were tried. See *Callender v. Florida*, 383 U.S. 270, 380 U.S. 519. Cf. *Naim v. Naim*, 350 U.S. 985. Alternatively, the Court could formulate an order reversing the judgments of the courts below, and directing

the Circuit Court to enter an appropriate decree, including provision for such damages as that court may fix. See *Stanley v. Schwalby*, 162 U.S. 255, 279-283; 28 U.S.C. § 2106; 28 U.S.C. § 1651(a).[23]

Respectfully submitted,

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Of Counsel

January 1969.

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[23] "The power to enter judgment and, when necessary, to enforce it by appropriate process, has been said to be inherent in the Court's appellate jurisdiction." *Fay v. Noia*, 372 U.S. 391, 467 (dissenting opinion of Justice Harlan). See *Williams v. Bruffy*, 12 Otto 248, 255-256; *Tyler v. Magwire, supra*, 17 Wall. at 289-293; *Martin v. Hunter's Lessee, supra*, 1 Wheat. at 361; *McCulloch v. Maryland*, 4 Wheat. 316, 437; *Gibbons v. Ogden*, 9 Wheat. 1, 239; *Kreshik v. St. Nicholas Cathedral*, 63 U.S. 190, 191.

APPENDIX A

STATUTES

42 U.S.C. Section 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. R.S. § 1977.

42 U.S.C. Section 1982. Property rights of citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property. R.S. § 1978.

CONSTITUTION OF THE UNITED STATES

Article VI

* * *

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution of laws of any State to the contrary notwithstanding.

* * *

Amendments

Article I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or

abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances.

* * *

Article XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

* * *

Article XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

RULES OF THE SUPREME COURT OF APPEALS OF VIRGINIA

Rule 5:1. The Record on Appeal

Sec. 3. Contents of Record

* * *

(f) Such a transcript or statement not signed by counsel for all parties becomes part of the record when delivered to the clerk, if it is tendered to the judge within 60 days and signed at the end by him within 70 days after final judgment

It shall be forthwith delivered to the clerk who shall certify on it the date he receives it. Counsel tendering the transcript or statement shall give opposing counsel reasonable written notice of the time and place of tendering it and a reasonable opportunity to examine the original or a true copy of it. The signature of the judge, without more, will be deemed to be his certification that counsel had the required notice and opportunity, and that the transcript or statement is authentic. He shall note on it the date it was tendered to him and the date it was signed by him.

* * *

APPENDIX B

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

SULLIVAN ET AL. v. LITTLE HUNTING PARK, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 1188. Decided June 17, 1968.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment is vacated. The case is remanded to the Supreme Court of Appeals of Virginia for further consideration in light of *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, decided this date.

Mr. Justice Harlan and Mr. Justice White dissent for the reasons stated in Mr. Justice Harlan's dissenting opinion in *Jones v. James H. Mayer Co.*, 392 U.S. 409, 449, decided this date.

SUPREME COURT OF APPEALS
OF VIRGINIA

Present: All the Justices

PAUL E. SULLIVAN, ET AL.

-v- Record No. R-8257

LITTLE HUNTING PARK, INC., ET AL.

PER CURIAM

Richmond, Virginia

October 14, 1968

T. R. FREEMAN, JR., ET AL.

-v- Record No. R-8176

LITTLE HUNTING PARK, INC., ET AL.

On August 4, 1967, a petition for appeal was filed in this court by Paul E. Sullivan, his wife, and their seven minor children. On August 25, 1967, a petition for appeal was filed by T. R. Freeman, Jr., his wife, and their two minor children. The petitions sought the reversal of decrees of the Circuit Court of Fairfax County in two chancery causes wherein the Sullivans and the Freemans had filed individual bills of complaint against Little Hunting Park, Inc., a Virginia corporation chartered to operate a community swimming pool, and the directors thereof. The petitions asserted that by their bills, the complainants had sought injunctive relief and monetary damages for the allegedly wrongful acts of the defendants in refusing to approve the assignment by Sullivan of his membership share in the corporation to Freeman, a member of the Negro race, and in expelling Sullivan from membership in the corporation.

On December 4, 1967, this court rejected the said petitions and refused the said appeals because, in the words of the order entered in each case, "the appeal was not perfected in the manner provided by law in that opposing counsel was not given reasonable written notice of the time and place of

tendering the transcript and a reasonable opportunity to examine the original or a true copy of it (Rule 5:1 § 3(f); *Snead v. Commonwealth*, 200 Va. 850, 108 S.E.2d 399)."

On October 5, 1968, the clerk of this court received from the Supreme Court of the United States a copy of an order dated October 4, 1968, entered in the consolidated Sullivan and Freeman cases, amending an order entered June 17, 1968, and reciting that in the earlier order it was ordered and adjudged "that the judgments of the said Supreme Court of Appeals in these causes be vacated with costs, and that these causes be remanded to the Supreme Court of Appeals of the Commonwealth of Virginia for further consideration not inconsistent with the opinion of this Court."

The opinion of the Supreme Court referred to in its order of June 17, 1968, was as follows:

> "The petition for a writ of certiorari is granted and the judgment is vacated. The case is remanded to the Supreme Court of Appeals of Virginia for further consideration in light of *Jones v. Alfred H. Mayer Co.*, U.S. , No. 645, decided this date."

The case of *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S. Ct. 2186, 20 L. ed. 2d 1189 (1968), referred to in the opinion of the Supreme Court, dealt not with the question of the application by a state appellate court of its rules of procedure in determining its jurisdiction to entertain an appeal. Instead, the *Jones* case dealt with the question of the refusal of the Mayer company to sell Mr. and Mrs. Jones a home because Mr. Jones was a Negro. By applying an 1866 act of Congress, 42 U.S.C. § 1982, the Court found such refusal discriminatory and illegal.

In *Snead v. Commonwealth*, 200 Va. 850, 108 S.E.2d 399, referred to in the orders of this court refusing the appeals in these cases, we held the terms of Rule 5:1, § 3(f) to be mandatory and jurisdictional, and for the failure of counsel for Snead to meet the requirements of the Rule, the writ of error and supersedeas was dismissed.

Our orders of December 4, 1967, refusing the appeals in these cases, were adjudications that this court had no jurisdiction to entertain the appeals because of the failure of counsel for the Sullivans and the Freemans to meet the requirements of Rule 5:1, § 3(f). Only this court may say when it does and when it does not have jurisdiction under its Rules. We had no jurisdiction in the cases when they were here before, and we have no jurisdiction now. We adhere to our orders refusing the appeals in these cases.

~~APPENDIX C~~

VIRGINIA

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday *the* 4th *day of* December, 1967.

The petition of Paul E. Sullivan, Flora L. Sullivan, and William F. Sullivan, Graciela P. Sullivan, Ana I. Sullivan, Maire Sullivan, M. Dolores Sullivan, M. Monica Sullivan and Brigid Sullivan, infants, who sue by Paul E. Sullivan, their father and next friend, for an appeal from a decree entered by the Circuit Court of Fairfax County on the 12th day of April, 1967, ~~in a~~ certain chancery cause then therein depending, wherein the said petitioners were plaintiffs and Little Hunting Park, Inc., and others were defendants, having been maturely considered and a transcript of the record of the decree aforesaid seen and inspected, the court being of opinion that the appeal was not perfected in the manner provided by law in that opposing counsel was not given reasonable written notice of the time and place of tendering the transcript and a reasonable opportunity to examine the original or a true copy of it (Rule 5:1, § 3(f); *Snead v. Commonwealth*, 200 Va. 850, 108 S.E. 2d 399), doth reject said petition and refuse said appeal.

A Copy,

Teste:

Clerk

~~APPENDIX I~~

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday *the* 4th *day of* December, 1967.

The petition of T. R. Freeman, Jr., Laura Freeman, and Dale C. Freeman and Dwayne L. Freeman, infants, who sue by T. R. Freeman, Jr., their father and next friend, for an appeal from a decree entered by the Circuit Court of Fairfax County on the 8th day of May, 1967, in a certain chancery cause then therein depending, wherein the said petitioners were plaintiffs and Little Hunting Park, Inc., and others were defendants, having been maturely considered and a transcript of the record of the decree aforesaid seen and inspected, the court being of opinion that the appeal was not perfected in the manner provided by law in that opposing counsel was not given reasonable written notice of the time and place of tendering the transcript and a reasonable opportunity to examine the original or a true copy of it (Rule 5:1 § 3(f); *Snead v. Commonwealth*, 200 Va. 850, 108 S.E. 2d 399), doth reject said petition and refuse said appeal.

A Copy,

Teste:

Clerk

APPENDIX F

SIXTEENTH JUDICIAL CIRCUIT OF VIRGINIA
PRINCE WILLIAM COUNTY FAIRFAX COUNTY ALEXANDRIA CITY

Fairfax County Courthouse,
Fairfax, Virginia, 22030,
April 7, 1967.

Mr. Robert M. Alexander,
1829 Columbia Pike,
Arlington, Virginia. 22204

Mr. John C. Harris,
1500 Belle View Boulevard,
Alexandria, Virginia.

Re: Sullivan v. Little Hunting Creek Park,
In Chancery No. 22751.

Gentlemen:

I find for the defendants in this case. It is my opinion that the expulsion of Mr. Sullivan should be upheld. The defendant Club may be a community recreation facility, but it is not a trade organization. It is private and social as is shown not only by its charter and By-Laws but also by its minutes, which regularly include a recital of "social activities." The requirement of approval of membership applications by the Board of Directors, even though the prospect might meet all other qualifications, would seem to be conclusive on this point. This being so, the Court's power to review the action of the Board of Directors is limited. I find no reason to set it aside. The Board acted within the powers conferred on it by the By-Laws, and there was ample evidence to justify its conclusion that the complainant's acts were *inimicable* to the Corporation's members and to the Corporation.

I do not believe property rights are involved in this case to any material extent. The number of memberships is inconsequential when considered with the number of homes in the residential areas mentioned in the By-Laws. The further fact there are such a large number of memberships available for sale with no buyers that the Directors considered the advisability of buying them in would appear to be a conclusive answer to this argument.

I do not find it necessary to pass on the defense that the stipulation of July 16, 1965, constituted a valid compromise and settlement and that under it the complainant is prevented from taking further action, although I am inclined to view that such is the case.

Mr. Harris can prepare a decree in accord with the foregoing and submit it to Mr. Alexander for his endorsement and exceptions.

Very truly yours,

James Keith.

JK:elc

Copy to:
Mr. Allison W. Brown, Jr.,
Suite 501, 1424 16th Street, N. W.,
Washington, D. C. 20036

† † †

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

PAUL E. SULLIVAN, et al.,

Plaintiffs,

v. RE-HEARD BY [illegible]

LITTLE HUNTING PARK, INC., et al.,

Defendants.

DECREE

This matter came on to be heard this 12th day of March 1967, upon the bill of complaint, the answer of the defendants, upon the taking of evidence, upon argument of counsel, upon due consideration of the memoranda of law submitted by counsel, and the Court's specific finding that the defendant, LITTLE HUNTING PARK, INC., is a private and social club whose by laws require approval of the Board of Directors for membership, and there was ample evidence to justify a finding that the complainant's acts were inimicable to the corporation's members and to the corporation and the Board of Directors of the defendant corporation acted within the powers conferred upon it by the by laws of the corporation, it is therefore,

DECREED that the relief requested by the complainant be denied, to which ruling counsel for complainants except.

THIS DECREE IS FINAL.

ENTERED this 12th day of April, 1967.

James Keith
Judge

Entered in Chancery Order
Book No. 120, page 318

SEEN:

John Chas. Harris
Counsel for Defendants

SEEN AND EXCEPTED:

Robert M. Alexander
Allison W. Brown, Jr.
Peter Ames Eveleth

By Robert M. Alexander
Counsel for Complainants

~~APPENDIX F~~

SIXTEENTH JUDICIAL CIRCUIT OF VIRGINIA
PRINCE WILLIAM COUNTY FAIRFAX COUNTY ALEXANDRIA CITY

Fairfax County Courthouse,
Fairfax, Virginia. 22030,
April 21, 1967.

Mr. Robert M. Alexander,
1829 Columbia Pike,
Arlington, Virginia.

Mr. John C. Harris,
1500 Belle View Boulevard,
Alexandria, Virginia.

Re: Freeman v. Little Hunting Park, Inc.:
In Chancery No. 22752.

Gentlemen:

It is my opinion that the conclusion formerly reached in this matter that the defendant corporation is a private social club is controlling in this case. No constitutional right of the plaintiff has been violated. He does not come within the protection of the Civil Rights Act. The charter and by-laws of the corporation constitute a contract between the corporation and the members and between the members themselves. Under the by-laws, transfers and assignments are subject to the approval of the Board of Directors. All parties were aware of this fact. Section 13-105 of the 1950 Code of Virginia, relied on by the complainant, has been repealed. The refusal to approve the assignment to complainant appears to be consistent with the law and with the articles of incorporation. Therefore the relief prayed for will be denied.

Mr. Harris can prepare a decree in accordance with the foregoing and submit it to Mr. Alexander for his endorsement. I am sending a copy of this letter to Mr. Brown.

Very truly yours,

James Keith.

JK:elc

Copy to Mr. Allison W. Brown, Jr.

† † †

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

T. R. FREEMAN, JR., et al.,

Plaintiffs,

v. IN CHANCERY NO. 22752

LITTLE HUNTING PARK, INC., et al.,

Defendants.

DECREE

THIS cause came to be heard this 12th day of April, 1967 upon the bill of complaint, the answer of the defendants, upon the taking of evidence, upon argument by counsel, upon due consideration of the memoranda of law submitted by counsel, and the courts specific finding that the defendant, LITTLE HUNTING PARK, INC., is a private, social club whose by-laws require approval of the board of directors for transfers and assignments of membership; that no constitutional right of the complainants have been violated and they do not come within the protection of the Civil Rights Act, it, is, therefore,

ADJUDGED, ORDERED and DECREED that the relief requested by the complainants be denied, to which ruling counsel for complainants except.

THIS DECREE IS FINAL.

Entered this 8th day of May, 1967.

James Keith
Judge

SEEN:

John Chas. Harris
Counsel for Defendants

SEEN AND EXCEPTED:

Robert M. Alexander
Allison W. Brown, Jr.
Peter Ames Eveleth

By Robert M. Alexander
Counsel for Complainants